

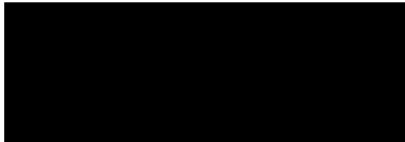
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U.S. Department of Homeland Security  
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
425 Eye Street N.W.  
BCIS, AAO, 20 Mass. Ave., 3rd Floor  
Washington, D.C. 20536



JUL 10 2003

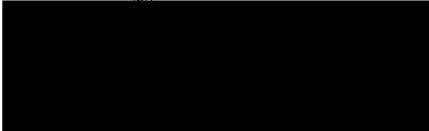
FILE: WAC 01 253 59283 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



**INSTRUCTIONS:**

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was incorporated in 1993 in the State of California and is claimed to be a wholly-owned subsidiary of [REDACTED] [REDACTED] [REDACTED] located in China. The petitioner is engaged in the business of importing, exporting, and selling silk fabric, raw material, garment and accessories, and developing a line of machinery for export. It seeks to employ the beneficiary as its marketing manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel submits a statement refuting the director's findings.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

\* \* \*

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The issue in this proceeding is whether the beneficiary will be employed in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;

- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the initial filing, the petitioner provided the following statements regarding the beneficiary's job duties as marketing manager for the U.S. organization:

[The beneficiary] is responsible for locally hiring marketing professionals and working closely with them as a team. He also acts as a liaison to provide our parent company the effective methods of opening new channels through which to promote new products as well as establishing name brands for our products.

On December 6, 2001, the director instructed the petitioner to submit, in part, its organizational chart identifying the beneficiary's position, a more detailed description of the beneficiary's job duties indicating the percentage of time spent performing each duty, and a list of all of the employees under

the beneficiary's supervision. The petitioner was asked to provide brief job descriptions, education levels, and salaries/wages of all of the beneficiary's subordinates, as well as state quarterly wage reports for all employees for the last four quarters.

In response to the above request, the petitioner submitted its organizational chart indicating that the beneficiary is second in command under the company's president. The chart indicates that the beneficiary's position title is that of Vice President, Business Manager. The chart also indicates that the beneficiary's subordinates include a marketing consultant/sales supervisor, a west coast designer/sales agent, and an east coast sales agent. The petitioner indicated that the two sales agents are contractors who were hired on a commission basis.

The petitioner provided the following description of the beneficiary's duties:

- As the VP & the Business Manager of [the petitioning company the beneficiary] takes charges [sic] of every phases of Marketing and Sales Management . . . . .
- [The beneficiary] hired . . . . an experienced professional sales manager to be the Marketing Consultant & Sales Supervisor . . . . He also kept the Market Survey Reports updated every quarter.
- [The beneficiary] worked closely with the sales team & took them to the major Apparel Shows held in New York City, Los Angeles, San Francisco & Las Vegas. He took part in almost every major business negotiation with the wholesalers & retailers.
- [The beneficiary] worked with the designer together to find out the fashion trends & made the necessary adjustments for the production lines of [the petitioner]. He also made Purchase Orders to the vendors either in USA or in China. He kept the balance of the inventories & the production. He was also for the Receivable Accounts & the Bad Debts of [the petitioner].

- [The beneficiary] acted as a liaison to provide the parent company in China the effective methods of new channels through which to promote new products as well as establishing name brands for their own products. He was responsible for the registration of the "soho" trademark . . . . He worked with the Attorney at Law together to prepare the paperwork in New York City & got the approval in the year 2000. He also helped the parent company to set up a branch office in New York City. . . .
- [The beneficiary] also took part of the management of the China parent Company because of the business involved in. He made the purchase orders to them & arranged the payment for the production. He instructed his ex-Dept. staffs to tracing the new fabric, new machine & new technique. . . .

The petitioner provided the following breakdown of time the beneficiary spent performing the above duties:

1. Marketing & Sales Management:	25%
2. Employee Management:	25%
3. Order & Manufacturing Management:	20%
4. Financial Management:	15%
5. Travel & other Business	15%

The director denied the petition, noting that the petitioner failed to submit sufficient evidence establishing that the beneficiary has "primary supervisory control" over the contractors it claims to have hired to assist with the sales duties. The director also stated that the tax documentation provided by the petitioner indicates that the petitioner employs only two individuals—the company president and the beneficiary himself. The director concluded that the petitioner failed to submit sufficient evidence to establish that the beneficiary's duties in the United States would be of a primarily managerial or executive capacity.

On appeal, counsel disputes the director's determination that the petitioner does not need both a president and a vice president, despite the fact that it had only two employees at the time of the filing of the petition. Counsel states that the beneficiary "has been essential for the operation of the

company." Contrary to counsel's apparent misconception, the Bureau does not dispute the beneficiary's considerable contributions to the success of the petitioning enterprise. Rather, the director clarifies that when a company employs a total of two individuals, one of whom is the president, it is unrealistic to claim that the president's only subordinate, i.e. the beneficiary, performs duties that are primarily managerial or executive. Although the petitioner claims that it hired two sales contractors on a commission basis, it has submitted no documentary evidence indicating that they have actually been paid or that they have made any sales to contribute to the company's gross income. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel also points out that the petitioner has a sales consultant who was on leave and for that reason did not appear on its wage and withholding reports for the first three quarters of 2001. However, the petition was filed at the end of the second quarter of 2001. Case law precedent has firmly held that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Thus, the petitioner's promise to hire additional employees at a later date cannot be taken into consideration for the purpose of establishing the petitioner's eligibility based on the current petition.

Counsel asserts further that the director's decision was largely based on the size of the petitioning organization, and urges the AAO to consider that the petitioner's reasonable needs are satisfied with a small number of employees. However, where a sales-based operation, such as the petitioner's, asserts that it is best served with a president, a vice president, and a single sales consultant, the Bureau may, and should, question whether the beneficiary's duties are, in fact, primarily managerial or executive. Even though counsel asserts that they are, the Bureau will look first to the petitioner's description of the job duties in examining the executive or managerial capacity. See 8 C.F.R. § 204.5(j)(5). In the instant case, the description of duties provided in response to the request for additional evidence indicates that a large portion of the

beneficiary's overall job involves handling non-qualifying duties, including updating quarterly market survey reports, attending apparel shows, working with designers on finding fashion trends, making purchase orders, taking inventory, and taking responsibility for accounts receivable and accounts payable. Upon review, the description of the beneficiary's job duties led the Bureau to conclude that the beneficiary is performing as a professional or "staff officer," but not as a manager or executive. It is noted that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

On review, the record contains insufficient evidence to demonstrate that the beneficiary has been and will be employed in a primarily managerial or executive capacity. Further, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel, or that he will be relieved from performing non-qualifying duties. The Bureau is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

Beyond the decision of the director, the record lacks sufficient evidence to determine that the petitioning enterprise has a qualifying relationship with the claimed parent company. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this immigrant visa classification. *Matter of Church of Scientology International*, at 593; see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986) (in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant visa proceedings). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church of Scientology International* at 595.



In the instant case, the petitioner has provided a stock certificate to support its claim that it is wholly owned by the foreign entity. Counsel claimed, in response to the request for additional evidence, that the stock certificate is "a legal[ly] binding document that establishes ownership rights." However, as general evidence in an immigrant petition for a multinational executive or manager, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The regulation at 8 C.F.R. § 204.5(j)(3)(ii) specifically allows the director to request additional evidence in appropriate cases. As ownership is a critical element of this visa classification, the Bureau may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. However the petitioner has not established that the foreign entity actually contributed the funds to purchase the petitioning enterprise. As previously noted, simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra*. As this appeal will be dismissed on the grounds discussed above, the issue of a qualifying relationship need not be further addressed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.